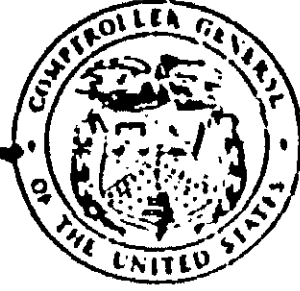


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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-203233

DATE: January 8, 1932

MATTER OF: Williams & Lane, Inc.

DIGEST:

Where IFB required that bidders submit data on two different forms, bid reasonably treating each form as requiring unique data was responsive. Solicitation was ambiguous because bidders were not clearly advised that forms were to contain identical data.

Invitation for bids (IFB) No. H62922-81-B-3566 was issued by the Department of the Navy for the procurement of "5000 net kW diesel engine generator sets and ancillary equipment including * * * cooling systems, * * * piping * * * switchgear * * * motors and miscellaneous equipment." In order to ensure the purchase of fuel-efficient equipment, the Navy required bidders to guarantee fuel consumption rates for the equipment offered to provide a basis for using fuel costs in evaluating bids and to furnish descriptive data to permit the Navy to assess compensatory damages should the delivered equipment fail to comply with the guarantee. The Navy rejected the low bid submitted by Williams & Lane, Inc., and awarded a contract to Transamerica Delaval, Inc., after concluding that the data furnished by the protester had qualified its bid by limiting its fuel consumption guarantee to the engine assembly alone.

Williams & Lane protested saying it responded to the solicitation by furnishing the descriptive data and guarantee requested and that, therefore, the rejection of its bid was improper. According to the protester, the purpose and scope of the guarantee must be understood by reading the descriptive data provision together with the compensatory damages clause which, the protester argues, is based on a guarantee of the efficiency of the engine assembly. The protester says it guaranteed the system as well as the engine and furnished the data requested. It says, however, that it did not include

in some of its calculations the effect which certain accessorial equipment would have on total system efficiency. It did not do so, it says, because it believed that the effect of that equipment was not to be included in computing the data to which the compensatory damages clause would apply.

Based on our review of this matter, we find that the IFB used by the Navy was ambiguous and that the protester's bid conformed to one possible interpretation of that solicitation. We sustain the protest.

The Navy's interpretation of the IFB is based on the IFB bid evaluation criterion (IFB Attachment A-7) which, in addition to requiring that offerors furnish guaranteed fuel consumption rates, provided as follows:

"BID EVALUATION: After the bids are received, they will be evaluated on the basis of the total cost per net kilowatt [hour] of generating capacity after applying fuel oil consumption cost adjustments in the event guaranteed fuel consumption rates differ from the predetermined values noted herein."
(Emphasis added.)

Because bid evaluation was to be based on "total cost per net kilowatt" hour, the Navy believes that all system components (including accessorial cooling equipment) which would affect efficiency were to be considered in providing the data to be included on page A-7.

The protester agrees that the data to be furnished on page A-7 was to provide a basis for computing total fuel consumption costs. The protester insists that by providing such cost data it guaranteed the overall efficiency of the system it proposed.

However, the protester contends, the scope of the guarantee differs from the scope of the IFB compensatory damages clause. While the performance of the proposed system is to be guaranteed, and will be evaluated in making award, compensatory damages are based on separate testing of the engine, which in turn is the most critical

component determining fuel efficiency. Thus, it maintains, the IFB required that offerors submit two sets of performance data--one for the assembled system to permit evaluation of the guarantee and one (consisting of data for the engine, generator, and engine coupled to the generator) to provide a basis against which compensatory damages could be assessed.

The protester says that fuel efficiency based on factory tests will not be the same as the efficiency of the installed equipment, as reported on page A-7. In this respect, the protester quotes IFB paragraph 2.25.7 which stated that:

"[Compensatory] damages will be assessed against the Contractor if the fuel consumption rates of any or all of the electric generating units exceed the guaranteed fuel consumption rates based on tests at the factory. The damages will be determined by computing the excess costs for operating the equipment based upon the differences between the guaranteed fuel consumption rates and the actual fuel consumption rates as determined by the specified tests for 1/2 load, 3/4 load and full load.
* * *" (Emphasis added.)

The protester, to support its position that a determination of efficiency based on factory tests will differ from the efficiency of the equipment once it is installed, also cites IFB paragraphs 2.25.3.9 and 2.25.3, which provided:

Paragraph 2.25.3.9 --

"The engines shall be tested at the factory and the method of providing the test loads shall be at the option of the engine manufacturer. The test loads shall be equivalent to the specified percentages of rated electrical output (KW)." (Emphasis added.)

Paragraph 2.25.3 --

"Factory tests and inspections shall be performed prior to shipment on each diesel engine, generator, and other

equipment specified herein. Test procedures shall conform to standards of the Diesel Engine Manufacturers Association (DEMA) Standard Practices section on testing, as appropriate and applicable."

The protester says these provisions clearly limit the scope of required fuel efficiency tests under a contract to a shop test of the engine assembly, which may be done (paragraph 2.26.3.9) by placing the engine under a simulated load and measuring the amount of fuel consumed. Further, the protester has furnished a copy of portions of the DEM\ standards mentioned in paragraph 2.25.3. These standards do not list ancillary cooling equipment in defining what is included in an engine assembly. Thus, in the protester's view the IFB did not require that the engine be connected to the generator or to accessories which would be separately installed during final installation at the Navy site.

The Navy insists that the descriptive data which offerors were to submit with their bid packages (as page A-5 of an IFB Attachment) was to be the same as data furnished on IFB page A-7 (set out above). Page A-5 provides that offerors should furnish certain data as follows:

"Diesel Generating Unit Guarantees: Fuel consumption figures shall be based on operation with diesel fuel with a low-heating value of 18,190 BTU/LB. and a density of 7.4 pounds per gallon. Fractional loads shall be calculated on the basis of net ratings unless otherwise called for.

According to the Navy, it is obvious from the IFB that the A-5 and A-7 data must be the same, and that, since the protester's data was not consistent, the protester qualified its guarantee. This is conveyed, according to the Navy, by the use of the term net kilowatt hour as a measure of the energy delivered in describing both the A-5 and A-7 requirements. The Navy indicates that it intended to require only that offerors guarantee the system as a whole and that there is "no

basis" for what it regards as the protester's conclusion that engine performance alone was to be guaranteed. According to the Navy, A-5 concerns only performance data and has nothing to do with the fuel consumption guarantee.

The fallacy of Navy's position is, however, that, as discussed above, the DEMA standards referred to in the definitions do not include accessorial equipment such as is involved here but only equipment which the industry would normally treat as part of the engine assembly. The term "net" in reference to the amount of energy delivered is itself defined in the IFB to include only the effect of equipment which would be attached to the engine assembly under DEMA standard practice.

As the protester points out, if the Navy means what it says when it contends that A-5 concerns only performance data and that A-5 has nothing to do with the guarantee, then the Navy must apply the compensatory damages clause by testing the installed system, and cannot rely on engine tests at the factory. This is because the Navy otherwise would have no data from which to evaluate performance. To determine whether the guarantee is met by testing the entire system would require that the engine manufacturer duplicate the Navy installation at its factory by testing all of the equipment to be installed at the Navy site including the ancillary cooling equipment.

As we view this matter, the parties' disagreement stems from the fact that use of the phrase "total cost per net kilowatt" hour on page A-7 of the IFB renders the meaning of the IFB uncertain. If the definitions of the term "net" as used on pages A-5 and A-7 of the IFB are to be the same, the same data should have been provided on each, as the Navy contends. However, applying the DEMA standards which are clearly incorporated into the definition of "net," neither the A-5 nor the A-7 data should have included losses in efficiency resulting from the accessorial equipment. This, in turn, conflicts with the Navy's intention that the term "total cost" as used in page A-7 was meant to require data for bid evaluation based on performance of the installed system as a whole.

Each of the parties dealt with this problem differently. The Navy "resolved" the contradiction by ignoring the DEMA standards. The protester "resolved" it by assuming, in effect, a different definition of "net" (by deducting ancillary losses before calculating total cost) as used on page A-7. Our examination of the bids other offerors submitted indicates it is possible that a least one of them bid on the basis of a third possibility by understating total cost on page A-7.

We believe the data furnished by the protester, which gave each portion of A-5 and A-7 meaning, represented an appropriate attempt on its part to furnish what it reasonably thought the Navy was seeking.

In the first place, we agree with the protester that the compensatory damages clause as written is based on the use of factory tests of the engine assembly, using simulated loads and excluding accessories which would not be included by the engine manufacturer in a normal shop test. The IFB language quoted above is quite clear in this respect; to the extent that the Navy believed more should have been required, it should have amended its solicitation to say so.

Second, as the protester points out, the Navy's request for separate data in the various parts of A-5 and in A-7 suggests that different data were required for each. Moreover, it is our view that a requirement that offerors furnish identical descriptive data on more than one form represents poor procurement practice, because the risk that the agency's intent will be misunderstood or that an inadvertent error will be made is increased unnecessarily. Where an agency expects identical data to be furnished twice it must make its intent plain. Otherwise, it necessarily introduces ambiguity.

We find the protester's bid was based on a reasonable reading of the Navy's ambiguous solicitation and that its bid on that basis was low.

Protest sustained.

Ideally, we would recommend that the Navy terminate the Transamerica Delaval contract for convenience and resolicit its requirement using a revised solicitation. However, we are aware that only several months remain before scheduled delivery under the awarded contract. Thus, as a practical matter, remedial relief may be foreclosed.

We are not in a position, therefore, to determine what form appropriate corrective action might take. Accordingly, we are remanding this matter to the Navy and requesting that it recommend to our Office appropriate action to be taken in this procurement.

Harry R. Van Cleave
For The Comptroller General
of the United States